93-81

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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JOHN J. HART,

*Petitioner,*

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a L.F.C. POWER CORPORATION,

*Respondent.*

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**Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Sacramento Appellate Department**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In ruling that Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, pre-empts application of the California wage-and-hour law to employees working under collective bargaining agreements, did the Superior Court for the State of California, in and for the County of Sacramento, Appellate Department, deprive petitioner of rights guaranteed him under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157?

## PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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**Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Sacramento Appellate Department**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner John J. Hart prays that the Court issue a writ of certiorari to the Superior Court of the State of California, in and for the County of Sacramento, Appellate Department.

## OPINIONS BELOW

The decision of the Sacramento Municipal Court is set forth at pages 1a to 9a of the Appendix (App. 1a-9a). The ruling of the Superior Court of the State of California, in and for the County of Sacramento, Appellate Department, reversing the Municipal Court, is set forth at App. 10a, and the Superior Court's decision on petition

for rehearing is set forth at App. 11a. The Order of the Court of Appeal of the State of California, in and for the Third Appellate District, denying petitioner's petition for writ of mandate, is set forth at App. 13a. The order of the Supreme Court of the State of California, denying petitioner's petition for review, is set forth at App. 14a. None of these decisions or orders has been officially reported.

## JURISDICTION

The Superior Court of the State of California, in and for the County of Sacramento, Appellate Department, entered its ruling on petition for rehearing, reversing the trial court and finding the petitioner's claim pre-empted by federal law, on October 13, 1992. On January 28, 1993, the Court of Appeal of the State of California denied petitioner's writ of mandate, and on March 17, 1993, the California State Supreme Court issued its order denying petitioner's petition for review of the Court of Appeal order. On June 9, 1993, the Honorable Justice Sandra Day O'Connor issued an order granting petitioner a thirty-day extension of time, until July 15, 1993, in which to file this petition for writ of certiorari. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in

> an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Cal. Lab. Code § 201 provides in relevant part:

> If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

Cal. Lab. Code § 203 provides in relevant part:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days.

Cal. Lab. Code § 229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

## STATEMENT OF THE CASE

### A. Facts

Petitioner John Hart is a construction electrician. Between May 16 and August 29, 1988, Respondent Stockmar Energie, doing business as L.F.C. Power Systems Corp. ("LFC"), employed Hart under a collective bargaining agreement between the company and the National

Industrial Union ("NIU").[1] On August 29, LFC's field supervisor, Don Morrell, terminated Hart, and presented him with a check for wages owed through the time of his termination. Upon receiving the check, Hart pointed out to Morrell that he had worked one hour of overtime during the preceding pay-period which was not reflected in the paycheck, and that he was therefore entitled to more money. App. 5a.

The California Labor Code requires an employer who discharges an employee to pay that employee all wages due at the time of discharge. Cal. Lab. Code § 201. It further imposes penalties on employers who willfully fail to make timely payments. *Id.* § 203.

Two weeks after he was terminated, Hart still had not received pay for his overtime. At Hart's request, Ed Stuart, the NIU Business Manager, filed a grievance with LFC, seeking both the wages owed for the overtime work, and "all applicable penalties under state and federal law." App. 2a. Stuart met with an LFC representative on September 26, 1988, and, on October 10, Hart received a check from LFC for $27.38 in overtime compensation. NIU declined to process the grievance any further: there were no provisions in the collective bargaining agreement for penalties for late payments, and the union had therefore secured all the relief available through the grievance-arbitration procedure. App. 3a.

Hart then began his attempts to secure § 203 penalties under California law. The California Labor Code authorizes the state Labor Commissioner to enforce claims for penalties owed under §§ 201 and 203, on behalf of employees who are "financially unable to employ counsel and . . . have claims which are valid and enforceable."

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[1] At the time of the events in this case, petitioner Hart was a member of the NIU. That union subsequently disbanded, App. 3a, and Hart is now a member of Local 340 of the International Brotherhood of Electrical Workers, AFL-CIO.

Cal. Lab. Code § 98.3(a). Hart filed a claim for penalties with the Labor Commissioner. As a matter of policy, however, the Commissioner does not process claims filed by employees working under collective bargaining agreements, *Livadas v. Aubry*, 749 F. Supp. 1526, 1528 (N.D. Cal. 1990), *rev'd*, 943 F.2d 1140 (9th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3836 (U.S. June 3, 1993) (No. 92-1920),[2] and he therefore declined to process Hart's claim. App. 3a. Hart subsequently filed a civil action to collect the penalties in the Sacramento Municipal Court.[3]

**B. Proceedings Below.**

Hart filed his complaint in the Sacramento Municipal Court on September 1, 1990. LFC defended on the grounds, *inter alia*, that resolution of Hart's claim required "the interpretation or application of a collective bargaining agreement," and was therefore both barred by § 229 of the California Labor Code and preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. App. 3a. After trial, Judge John Lewis held, as

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[2] The facts underlying *Livadas* are almost identical to those herein. Karen Livadas was terminated from her job, received her final paycheck three days later, and filed a claim under Labor Code §§ 201 and 203 with the State Labor Commissioner, who declined to process it "for the sole reason that she [was] an employee with a [collective bargaining agreement] containing an arbitration clause." 749 F. Supp. at 1528. Rather than pursuing her claim in state court, as did Mr. Hart, Ms. Livadas filed an action in the federal district court, claiming that the Commissioner's denial of benefits interfered with her federal rights under the NLRA, and therefore violated 42 U.S.C. § 1983. On cross motions for summary judgment, the district court held that Livadas had stated a claim under § 1983. 749 F. Supp. at 1535. The Ninth Circuit, however, reversed. 943 F.2d at 1147.

[3] Section 208 of the California Labor Code, Cal. Lab. Code § 208, permits individuals to pursue claims to enforce provisions of the Code in state court. Hart filed his complaint and prosecuted the action in Municipal Court *pro se*.

a matter of law, that the claim was neither barred by the statute nor pre-empted by Section 301. App. 4a. He further found, on the facts, that LFC had willfully withheld Hart's overtime compensation, and awarded Hart penalties totalling $4,380.00. App. 8a-9a. The judge found no need to apply or interpret the collective bargaining agreement in making these determinations.

LFC appealed the Municipal Court's decision to the Appellate Department of the Superior Court of the State of California. In opposing the appeal, Hart specifically noted the dangers inherent in finding § 301 to pre-empt minimum state labor standards. Quoting from *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, 471 U.S. 724, 756 (1985), Hart pointed out that:

> [i]t would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimum standards on nonunion employers.

Respondent's Opening Brief on Appeal from the Municipal Court of Sacramento County, at 7.

On September 10, 1992, the Superior Court entered an order, reversing the Municipal Court's judgment without explanation. LFC filed a petition for rehearing, requesting a statement of the rule of law to be applied by the trial court. The Superior Court granted the petition and entered a new decision, holding that Hart's claims were "barred by Labor Code section 229 and pre-empted by section 301 . . . ." App. 11a.

Hart sought review of the Superior Court's decision by filing a petition for writ of mandate with the California Supreme Court.[4] The Supreme Court transferred the

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[4] California does not provide any appeal as of right from the Superior Court. A litigant seeking relief from a Superior Court decision may attempt to obtain discretionary review, either through a court of appeal order, transferring the case "when the superior court certifies, or the court of appeal determines, that such transfer

matter to the Court of Appeals, App. 12a, which denied the petition for writ of mandate. App. 13a. Hart then sought review by the State Supreme Court, which that court denied. App. 14a.

## REASONS FOR GRANTING THE WRIT

In crafting doctrines of federal labor pre-emption—under § 301 of the LMRA, and under §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158—this Court has sought to balance the states' legitimate local interests in exercising their police powers, and the federal interest in advancing the various policies embodied in national labor law. Purporting to apply this Court's principles governing pre-emption under § 301, the Superior Court held that provisions of California's minimum wage statute were unavailable to the petitioner *solely* because he was employed under a collective bargaining agreement.[5] The court's decision in this regard—which "penalized workers who have chosen to join a union" by withholding the benefits of state labor regulations, *Metropolitan Life*, 471 U.S. at 756—merits this Court's review for two related reasons.

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appears necesary to secure uniformity of decision or to settle important questions of law," Cal. Civ. Proc. Code § 911; or through a writ of mandate, Cal. Civ. Proc. Code § 1085. *See, Simon v. Superior Court*, 4 Cal. App. 4th 63, 68, 5 Cal. Rptr. 2d 428 (1992); *Knudson v. Superior Court*, 267 Cal. App. 2d 876, 880 (1968) (citing Cal. Code of Civ. Pro. § 988t, precursor to § 911.)

[5] Although Cal. Labor Code § 229 and the Commission's non-enforcement policy purport to apply when employees work under bargaining agreements *containing arbitration provisions*, the fact is that "[f]ully 96% of [collective bargaining agreements] provide for arbitration." *Livadas v. Aubrey*, 749 F. Supp. at 1533 (*citing Characteristics of Major Collective Bargaining Agreements* (U.S. Dept. of Labor Bull. 2013, 1979), 82.) As a practical matter, the Commissioner's policy, endorsed by the Superior Court, thus precludes virtually all employees working under bargaining agreements from enjoying the protections of the Labor Code.

First, the Superior Court's ruling conflicts with the principles articulated by this Court in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985), and *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), regarding when the resolution of a state claim is sufficiently "independent" of the collective bargaining agreement to survive a claim of pre-emption under § 301. To the extent the court's error in this regard reflects lingering confusion within both the federal and state judiciaries in identifying when claims are "intertwined with" or "independent of" labor agreements,[6] *Allis-Chalmers*, 471 U.S. at 212, the California court's ruling warrants the Court's attention.

Moreover, the cavalier treatment of this case by the Superior Court points up the danger that lurks in leaving this area confused, for that court's misapprehensions concerning the reach of § 301 pre-emption threaten to undermine fundamental policies embodied in the NLRA, and thus implicate principles of NLRA pre-emption. The court understood § 301 to *require* the state to withhold the benefits of an otherwise generally-applicable state minimum-standards law to employees *covered by a collective bargaining agreement*, without regard to whether that agreement reaches the subject of the state law. The California court's decision disrupts the balance that federal labor laws seek to maintain, by placing a serious

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[6] The Ninth Circuit has characterized § 301 pre-emption as a "tangled interplay between federal and state law," constituting "one of the most confused areas of federal litigation," *Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991), while the Supreme Court of Washington has described this as an area in which "the courts are still struggling to ascertain when a claim's resolution actually *will* involve interpretation of the collective bargaining agreement." *Commodore v. University Mechanical Contractors*, 120 Wash. 2d 120, 129, 839 P.2d 314, 318 (1992) (emphasis in original). As the Washington court observed, "Section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*." *Id.* *See also* Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209 (1989) (describing Section 301 preemption as a "thicket").

impediment in the path of employees' decisions whether, and to what extent, to engage in collective bargaining. In this regard, while it comports with the approach taken by the Ninth Circuit in *Livadas v. Aubry*, 943 F.2d 1140, the Superior Court's decision directly conflicts with decisions of the Fourth and Eighth Circuits. *See Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148 (4th Cir. 1992), and *Steelworkers v. Johnson*, 830 F.2d 924 (8th Cir. 1987) (en banc). It accordingly presents an important issue which should be settled by this Court.

1. In delineating the contours of § 301 pre-emption, this Court has taken pains to define rules that would preserve the interests embodied in federal labor policy, while not subverting rights of states to establish minimum protections for its citizens. Thus, on the one hand, § 301 pre-emption is invoked to foster the federal interests in assuring uniform interpretations of collective bargaining agreements, *Teamsters v. Lucas Flour*, 369 U.S. 95, 103-04 (1962), and preserving "the central role of arbitration in our 'system of industrial self-government.'" *Allis-Chalmers v. Lueck*, 471 U.S. at 219 (*quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). In that respect, claims asserted under state law will be deemed pre-empted when either "founded directly on rights created by collective-bargaining agreements, [or] 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (*quoting Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.8 (1987)).

On the other hand, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine v. Arkansas-Best Freight System, Inc.*, 540 U.S. 728, 737 (1981). This Court has accordingly made clear that it would be "inconsistent with congressional intent under [§ 301] to pre-empt state rules that . . . establish rights and obligations, *independent* of a labor contract." *Allis-Chalmers*, 471 U.S. at 212 (emphasis added).

Petitioner's claim herein is that the California Labor Code established "rights" for private sector employees who are terminated from their jobs, and imposed precise "obligations" on employers, which exist, and are enforceable, "independent of a labor contract." The Labor Commissioner, and ultimately the Superior Court, viewed both the state law itself and principles of labor pre-emption to dictate otherwise. Thus, the Commissioner—as endorsed by the court—read § 229, the state legislature's pre-emption formula, to deprive any employee covered by a collective bargaining agreement of the protections of §§ 201 and 203. *And* the court found that principles of federal labor law support and demand the same result.

2. In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987), this Court emphasized that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." In *Fort Halifax*, the state legislature guaranteed minimum benefits to represented and unrepresented employees alike. The issue for this Court was whether it was inconsistent with federal law for the state to exercise its power by prescribing conditions for represented employees which their unions could otherwise bargain. In the instant case, by contrast, the state has "lightly inferred" pre-emption as a basis for *withholding* its power from one distinct sector of the working public: those employees covered by collective bargaining agreements. This case thus presents, in the starkest terms, the risk to employees' federally protected rights when the state erroneously views § 301 as precluding it from even-handedly utilizing its traditional police powers.

By misapplying principles of § 301 pre-emption, the California court has implicated the related, but analytically distinct, area of "*Machinists*" pre-emption under the NLRA.[7] As explained in *Metropolitan Life v. Massachu-*

[7] *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

*setts*, 471 U.S. at 749, *Machinists* pre-emption "protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." [8] Understanding that the NLRA's primary concern is not with the substantive terms of a privately-bargained agreement, but instead "with establishing an equitable process for determining" those substantive terms, *id.* at 753, this Court has held that "[m]inimum state labor standards [that] affect union and nonunion employees *equally* . . . neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Id.* at 755 (emphasis added).

Under these principles, this Court has found no inconsistency between the NLRA and state laws which specify minimum benefits that either are available to all employees, *id.*, or are available to all *unless* the parties to a collective bargaining agreement agree otherwise, *Fort Halifax Packing*, 482 U.S. at 22. *See also Barrentine v. Arkansas-Best Freight System*, 450 U.S. at 745 (no incompatibility between federal law establishing minimum employment standards and NLRA); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). This Court has, however, found a basic incompatibility between federal labor policy and a state's threat to withdraw state benefits from employees who utilize the instruments of that policy. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).[9]

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[8] While initially used "to determine whether certain weapons of bargaining neither protected by § 7 nor forbidden by § 8(b) could be subject to state regulation[,]" the doctrine has come to be used "to determine the validity of state rules of general application that affect the right to bargain or to self-organization." *Id.* at 750-51 n.27.

[9] *Nash* involved Florida's application of its unemployment compensation statute, which disqualified putative recipients for time when their unemployment was "due to a labor dispute in active progress." 389 U.S. at 441. The state unemployment commission considered an employee to be ineligible under that provision during

Three federal courts of appeals have recently considered whether states may validly withhold the benefits of generally-applicable laws in ways which impinge on federally-protected rights. Two of the three courts—the Fourth and Eighth Circuits—found these state actions to violate federal labor policy, while the Ninth Circuit held otherwise. The Fourth Circuit case, *Rum Creek Coal Sales v. Caperton*, 971 F.2d 1148, involved West Virginia's application of its "Neutrality Statute," W. Va. Code § 15-2-13, which forbids state officers to "aid or assist either party . . . in any labor trouble or dispute between employer and employee . . . ." 971 F.2d at 1150-52. The state police officially understood the statute to require them to refrain from providing even their usual measure of protection during a labor dispute, and during a coal mine strike, the police accordingly refused to arrest picketers trespassing on mine property. While acknowledging that the Neutrality Statute was facially valid, the Fourth Circuit held that the police's inaction had hampered the mine owner's federal right to withstand a strike.

The Eighth Circuit reached a similar result in *Steelworkers v. Johnson*, 830 F.2d 924, 926-29, concerning South Dakota's application of its unemployment compensation laws. The state statute required that claimants be "involuntarily unemployed" to be eligible for benefits. In *Johnson*, a coal mine operator shut down the mine in response to the union's vote to strike. The South Dakota Department of Labor denied benefits to all union members who were locked out, but granted them to the *nonunion* members of the bargaining unit, on the theory

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the time when her unfair labor practice charge, alleging she had been laid off for her union activities, was pending before the NLRB since, in the state's view, there was a "labor dispute in active progress" during that time. This Court held that the state's threat to withhold its benefits from employees who "cooperat[e] with the Government's constitutional plan" violated the Supremacy Clause. *Id.* at 239.

that, because the latter were ineligible to participate in the strike vote, they were "involuntarily unemployed." The members, by contrast, were deemed to be "voluntarily unemployed." Holding that the state agency's "skewed application of its facially neutral test . . . significantly burdens the section 7 right to participate in organized labor," 830 F.2d at 928-29, the *en banc* court enjoined South Dakota from applying the statute to disqualify employees based on their union activity. *Id.*

Unlike the Eighth and Fourth Circuits, the Ninth Circuit has failed to comprehend the damage to federal labor policy wrought by a state's practice of withholding benefits based on the intended recipient's exercise of protected rights. In *Livadas v. Aubry*, 943 F.2d 1140, the Ninth Circuit was confronted with precisely the same California Labor Commissioner's policy that is at issue herein. Livadas claimed that by denying her the benefits of § 203, the Commissioner had violated her federal rights. According to the Ninth Circuit, the gravamen of Livadas' claim was that the Commissioner had misapplied facially valid eligibility criteria, and in its view, Livadas had no federal right to a correct interpretation of a valid state statute. *Id.* at 1146. The court therefore held that it was without jurisdiction to evaluate the Commissioner's decision to deny represented employees the benefits of the state statute.[10]

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[10] While finding it unnecessary to reach the question whether the Commissioner had incorrectly held Livadas' claim to be pre-empted, *id.* at 1145, the court nonetheless essentially applauded the Commissioner for erring—if at all—on the side of leaving the dispute to be resolved through arbitration, *id.* at 1147, ignoring, as did the state court in this case, the fact that the remedies available under state law were not available under the collective bargaining agreement, and therefore not attainable through arbitration.

Between *Livadas* and this case, employees working under collective bargaining agreements in California are trapped in a sort of "Catch-22." According to the Ninth Circuit, employees like Livadas and Hart have no recourse in federal law and should, instead, pursue a mandamus action in state court. *Id.* at 1146. But according to the

3. The reach of the Superior Court's decision goes well beyond the interests of the individual petitioner in this case. Even limited to its particular facts, the case poses serious questions whether the California Labor Commissioner may continue to decline to enforce protective provisions of the Labor Code on behalf of employees whose *other* terms and conditions of employment are governed by collective bargaining agreements, and whether the state courts may similarly refuse to entertain such claims when individual employees attempt to prosecute them on their own behalf.

The implications, however, are far broader than the reach of this particular California statutory provision, since the principles at issue apply with equal force to state enforcement of all generally-applicable labor standards. Minimum labor standards, like those in *Metropolitan Life*, *Fort Halifax Packing*, and the California Labor Code, are extremely commonplace.[11] Indeed, enacting legislation which provides basic protections, and forms the "backdrop" against which parties may negotiate, "is 'a valid and unexceptional exercise of the [State's] police power.' "

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Superior Court's ruling in the instant case, such a state court action will not lie. These employees thus have no recourse at all, except in this Court.

[11] In providing but a "partial catalogue of [such] statutory employment standards in the [nine states in the] Ninth Circuit," the Service Employees International Union, AFL-CIO, CLC ("SEIU"), was able to identify *twenty* state statutes which create minimum employment conditions, including

> timely wage payment on discharge, employee access to personnel files, prohibitions against wage deductions for breakage or loss, prohibitions against blacklisting former employees, vesting rights in unused vacation pay on discharge, mandatory meal breaks and rest periods during the workday, and mandatory leave for jury and witness duty.

Brief of Amicus Curiae SEIU in Support of Petition for Certiorari, *Livadas v. Aubry*, No. 92-1920, at 4-5 (citations omitted). *See, id.* nn. 3-9 and Appendix.

*Fort Halifax Packing*, 482 U.S. at 21, 22 (*quoting Metropolitan Life*, 471 U.S. at 758). The California court has sanctioned the view that the mere presence of a collective bargaining agreement strips employees of the protections of state labor standards. Permitting this view to stand would essentially give the states carte blanche to penalize employees who choose to be represented by a collective bargaining agent, or indeed, who, though not *themselves* choosing union representation, are nonetheless represented by a collective bargaining agent by virtue of the choice of a majority of their co-workers.

Leaving the states with that power would serve seriously to undermine the collective bargaining scheme embodied in the NLRA and protected through *Machinists* pre-emption. As Judge Kozinski noted in his dissent in *Livadas v. Aubry*, California's approach to §§ 201 and 203 permits employers truthfully to warn their employees during labor organizing campaigns: "Look here, if you vote for the union, the first thing that happens is that the state Labor Commissioner abandons you." 943 F.2d at 1150 n. 2 (Kozinski, dissenting). In fact, accepting the Superior Court's approach as a reasonable means of state regulation would permit employers to warn employees generally that "if you vote for the union", *or if your colleagues vote for the union*, you may stand to lose the full panoply of minimum wage and employment protections otherwise available under state law. No greater deterrent to the exercise of § 7 rights is imaginable.

## CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

SACRAMENTO MUNICIPAL COURT DISTRICT
COUNTY OF SACRAMENTO,
STATE OF CALIFORNIA

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Case No. 89C18711

JOHN J. HART,

*Plaintiff,*

vs.

STOCKMAR ENERGIE, INC., dba L. F. C. POWER CORP.,

*Defendant*

---

## DECISION ON SUBMITTED MATTER

The above entitled cause came before the Court for trial on May 13, 1991. Plaintiff appeared in propria persona; defendant appeared by attorney DOROTHY BACSKAI EGEL. Evidence and argument were received, and the matter was submitted.

No statement of decision was requested; none is required. The Court will, nevertheless, briefly explain its decision.

The following facts were established by stipulation:

Plaintiff was employed by Defendant as a construction electrician between May 16, 1988 and August 29, 1988. During the period of employment, Plaintiff was covered by the terms of a collective bargaining agreement (hereinafter referred to as "the CBA") between the National Industrial Union (hereinafter referred to as "NIU") and Defendant. The CBA governs the terms and conditions of employment of Plaintiff by Defendant, including the

payment of overtime pay; but per Plaintiff is not the sole determinant. Article I, subsections 1.4(a) through 1.6 of the CBA provides for the resolution of grievances arising out of the CBA by the parties.

On August 29, 1988, Plaintiff was terminated from employment with Defendant. During his last pay period, Plaintiff did not inform either Morrell or Butterfield that he had worked any overtime during that period. On or about September 10, 1988, two (2) weeks after his employment ended, Plaintiff presented a grievance to his union representative claiming, *inter alia,* that Defendant owed Plaintiff overtime wages for one (1) hour's overtime work, and also claiming all applicable penalties under state and federal law. On or about September 10, 1988, Plaintiff's union representative presented a written grievance on behalf of Plaintiff to Defendant's collective bargaining representative claiming, *inter alia,* overtime wages and all applicable penalties under state and federal law. On or about September 26, 1988, Plaintiff's union representative met to discuss, *inter alia,* Plaintiff's claim for overtime compensation and penalties. By check dated September 30, 1988, Defendant paid Plaintiff Twenty Seven Dollars Thirty-eight cents ($27.38). As of October 10, 1988, Plaintiff was paid all overtime wages which he claimed to be owed by Defendant.

On the evidence presented without contradiction or impeachment, the Court makes the following additional findings:

At the time of Plaintiff's termination, Plaintiff's hourly rate was Eighteen Dollars Twenty-five cents ($18.25); and Defendant furnished Plaintiff with a payroll check which included payment for the hours worked, exclusive of overtime hours, through the time of termination on August 29, 1988. Defendant has not cashed the Twenty Seven Dollars Thirty-eight cents ($27.38) check ultimately paid for overtime. During the union and management meetings regarding the grievance submitted on

Plaintiff's behalf, Defendant insisted that federal and state penalties were not a part of the CBA. They in fact are not included or excluded by the CBA. When contacted, the union President refused to pursue the matter of penalties through arbitration on that basis, informing Plaintiff that his remedy lay with the state authorities for such a claim. Shortly thereafter, the union "dissolved or disbanded" and per the evidence the union President "disappeared." Plaintiff sought intervention regarding the penalties with the California Labor Commissioner. Defendant's attorney at such proceedings asserted that the Commission had no jurisdiction in light of Labor Code § 229 and federal preemption; that Plaintiff's remedy lay with the NLRB. The Labor Commission declined jurisdiction in light of Labor Code § 229. Plaintiff sought a remedy with the NLRB, which declined to exercise jurisdiction to enforce the state penalties. Plaintiff then filed this civil action.

In its answer to the amended complaint, Defendant asserted certain affirmative defenses, to wit: (1) that Plaintiff's claim requires the interpretation or application of a collective bargaining agreement and is thereby preempted by Section 301 of the Labor Management Relation Act, 29 USC § 185; (2) that Plaintiff's claim is barred by Section 229 of the California Labor Code; (3) that Plaintiff's claim is barred by the doctrine of accord and satisfaction; (4) that Plaintiff's claim is barred by the doctrine(s) of res judicata and/or collateral estoppel; and (5) that any failure to pay wages due upon termination of Plaintiff's employment was not "willful" within the meaning of California Labor Code § 203.

In earlier proceedings before a different Judge of this Court, Plaintiff prevailed against Defendant's demurrer and motion for summary judgment.

The Court respecting the trial, has independently researched the legal principles relevant to defendant's affirmative defenses, and concludes that Plaintiff's claim

(1) is not preempted by Section 301 of the Labor Management Relations Act; (2) is not barred by Section 229 of the California Labor Code; (3) is not barred by the doctrine of accord and satisfaction; and (4) is not barred by the doctrine(s) of res judicata and/or collateral estoppel. These conclusions are legal in nature, based upon essentially undisputed facts.

The substantial issue litigated and argued by the parties at trial was that identified by the Court in its denial of Defendant's motion for summary judgment to wit: Whether Defendant willfully failed to pay any overtime wages due Plaintiff in accordance with Labor Code § 201 (*sic*).

Although the Court's prior order refers only to Labor Code § 201, the essential dispute between the parties involves Labor Code § 203, which provides for waiting time penalties for a willful failure to pay wages required to be paid under Labor Code § 201. By regulation effective August 8, 1988, the State Labor Commission interprets "willful" under the statute as follows:

> "A willful failure to pay wages within the meaning of Labor Code § 203 occurs when an employer intentionally fails to pay an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> A "good faith dispute" that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute"."
>
> 8 Cal Code Reg 13520.

There was no dispute in the evidence that on the afternoon of Wednesday, August 24, 1988, Plaintiff, the field supervisor (Morrell) and the overall construction site supervisor (Butterfield) met to discuss construction progress and Plaintiff's performance on the site. There was no dispute that during the course of that meeting there were discussions regarding Plaintiff (as lead man) coming in one-half (½) hour early to review the plans in preparation for each day's activities. There was no dispute in the evidence that if Plaintiff was authorized to do so, and if Plaintiff did so prior to termination, Plaintiff was entitled at termination to overtime pay both under the CBA and under the company employee manual. There was no dispute as to what the rate of pay would be, nor as to the overtime Plaintiff claimed at termination.

There was no dispute in the evidence that Defendant made the determination to terminate Plaintiff on Friday, August 26, 1988; and effectuated the termination at midmorning on August 29, 1988. At that time, the check tendered and accepted did not include payment for overtime. There was no dispute in the evidence that when Plaintiff accepted the check he indicated that he was entitled to overtime pay.

Plaintiff was clear and adamant in his testimony that: at the August 24, 1988 meeting, Butterfield stated that he would authorize overtime for Plaintiff to come in early; that Plaintiff came in early on Thursday, Friday, and Monday; and that, when queried regarding the failure to include overtime in the termination check, Morrell indicated that he had just forgotten it, and would notify Portland to have an additional check forwarded. Butterfield did not testify at the trial.

Testimony established that shortly prior to the termination of Plaintiff, Plaintiff had been a part of a dispute with two or three other workers on the project, and that the dispute had been discussed between Holland (Plaintiff's

foreman), Morrell, and Butterfield. Holland testified that he was quite satisfied with Plaintiff's work; and that, contrary to his recommendation, Morrell and/or Butterfield made the determination to layoff Plaintiff. Morrell testified that he thought he recalled that others were laid off at about the same time as Plaintiff; all other evidence presented was to the contrary.

Morrell testified that he recalled a discussion with Holland regarding Plaintiff working overtime. His adamant recollection was that the discussion was part of a process of determining whether overtime would be authorized. Holland's recollection, though neither specific nor unequivocal, was that Morrell's statements were such that Morrell knew that overtime had been authorized, and was being worked.

On the issues of whether Plaintiff was authorized to work overtime and whether Morrell knew of the authorization, the Court finds in favor of Plaintiff and against Defendant. The clear preponderance of the evidence so indicated. As Plaintiff argued, the ultimate "smoking gun" on the point is the "6:30 a.m." entry by Morrell appearing on Defendant's Exhibit "E".

Did Plaintiff begin work early on Thursday, Friday, and Monday? His supporting witnesses (Norwood and Murray) were little helpful on the question of whether Plaintiff actually did work overtime as he testified. Norwood's testimony was internally inconsistent as he attempted to recall whether he was or was not still commuting with Plaintiff on the subject mornings; Murray recalled that Plaintiff worked early on Monday; but believed that Plaintiff started with the rest of the crew on Thursday and Friday.

The foreman's (Holland) Time Distribution Sheet did not indicate overtime work, but Holland testified that he did not come in early on Thursday, Friday, or Monday; so would not know whether Plaintiff was working early

or not. He was not informed on Friday of the Butterfield/ Morrell decision to terminate Plaintiff on Monday; so would have had no special reason to inquire of Plaintiff regarding the point. All witnesses agreed that it was standard practice regarding the preparation of payroll and termination checks to use both the Time Distribution Sheet and the time cards. Plaintiff testified that he did start work early, and that he did clock in. His time card, thus, would indicate whether he did or did not start work early on the days involved. Morrell testified that on Friday the 26th, to verify the Time Distribution Sheet information as to Plaintiff, he looked for and could not find Plaintiff's time card. Dorothy Beach Kofski testified regarding her inability to find Plaintiff's card at some point (she thought either Monday or Wednesday; conceded it could have been the preceding Friday). Norwood and Murray testified that Plaintiff's card was in the card locker after Plaintiff left the project. When pressed by the Court, Ms. Beach Kofski conceded that in the normal practice of Defendant and in light of Defendant's Exhibit "D", one might reasonably infer that Morrell had Plaintiff's time card when Defendant's Exhibit "D" was prepared. More importantly to the decision on this issue, when confronted by Plaintiff at the time of termination with the overtime issue, Morrell said nothing about a lost time card; specifically it "never occurred to him" to say anything about it. He testified that he later looked "again" for the time card and thinks he discussed it with Butterfield, but did not remember whether he had inquired of Holland. Finally, per his testimony, without Plaintiff's time card "there was no way to double check" Plaintiff's contentions that he was owed wages for overtime work.

Plaintiff has suggested that Morrell did not check the time card in connection with the preparation of the termination check, and that its absence was not discovered until Wednesday when Ms. Beach Kofski looked for it in connection with her end of the month practice. This

would be consistent with the testimony of Norwood and Murray that Plaintiff's time card had remained at the card locker after Plaintiff was terminated; but inconsistent with Morrell's testimony that immediately after Plaintiff complained regarding the overtime pay he searched for the card and it was missing. Moreover, it is inconsistent with Morrell's testimony that, when he accumulated the information for the termination check, (on Friday) he looked for and could not find Plaintiff's card.

On the evidence presented, the Court finds that Defendant was authorized to work the overtime hours, that he did work the overtime hours, and that he was not paid for the overtime hours until more than thirty (30) days after they were due.

Undoubtedly, there will be cases where an employer, upon good faith efforts to verify a terminating employee's claims, will properly delay payment and submit to grievance procedures related claims without incurring Labor Code Section 203 penalties. But in this case, the Court finds that Morrell (either in conjunction with Butterfield or not) either participated in circumstances giving rise to the loss of Plaintiff's card (after reviewing same and determining that overtime was claimed); or, prepared and delivered to Plaintiff a termination check without verifying by the time card whether overtime was claimed; then, when reminded of an overtime claim, proceeded with a reckless disregard for or indifference to Plaintiff's claim until the time card was lost—thereby leaving the employee in a situation where his claim would be fraught with the difficulties of litigation, and failing memories. The circumstances of this case, on the evidence presented, preclude a finding of a "good faith dispute"; Defendant's failure to pay the overtime was "willful" within the meaning of Labor Code § 203.

Plaintiff shall recover from defendant as a penalty under Labor Code § 203 One Hundred Forty Six Dol-

lars ($146.00) per day times thirty (30) days, for a total of Four Thousand Three Hundred Eighty Dollars ($4,380.00), plus costs. Plaintiff to prepare and submit an appropriate judgment for signature by the Court, submitting first to counsel for Defendant for approval as to form.

Dated: May 22, 1991

/s/ John R. Lewis
JOHN R. LEWIS
Judge of the Municipal Court

[SEAL]

**APPENDIX B**

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO
APPELLATE DEPARTMENT

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Dept. No.: 21

August 21, 1992

JUDGE ANTHONY DECRISTOFORO, JR., Presiding

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CV368127

JOHN J. HART,
*plaintiff/respondent*

vs.

STOCKMAR ENERGY, INC., *et al.*,
*defendant/appellant*

---

APPEAL FROM MUNICIPAL COURT
RULING ON SUBMITTED MATTER

The above entitled matter came on for oral argument on August 21, 1992. The matter was argued and the Court took the matter under submission. The Court now makes the following ruling:

The judgment is reversed.

**APPENDIX C**

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

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Dept. No.: 21

October 13, 1992

JUDGE ANTHONY DECRISTOFORO, JR., Presiding

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CV 368127

JOHN J. HART,
*plaintiff/respondent*
vs.

STOCKMAR ENERGY, INC., *et al.*,
*defendant/appellant*

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APPEAL FROM MUNICIPAL COURT
RULING ON PETITION FOR REHEARING

The petition for rehearing is granted. The new decision is the following:

Plaintiff's claim for penalties under Labor Code sections 201 and 203 is barred by Labor Code section 229 and preempted by section 301 of the Labor Management Relations Act (29 U.S.C., § 185.)

The judgment is reversed and the trial court is directed to enter judgment for defendant.

**APPENDIX D**

No. S030678

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

---

JOHN J. HART,
*Petitioner*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO
APPELLATE DEPARTMENT,
*Respondent*

STOCKMAR ENERGIE, INCORPORATED, *et al.*,
*Real Party in Interest*

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[Filed Jan. 15, 1993]

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The above entitled matter is transferred to the Court of Appeal, Third Appellate District.

/s/ Mosk,
Acting Chief Justice

**APPENDIX E**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

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3 Civil C015086
Sacramento CV368127

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JOHN J. HART,
*Petitioner*

vs.

SUPERIOR COURT, SACRAMENTO COUNTY,
*Respondent*

STOCKMAR ENERGIE, INC.,
*Real Party In Interest*

---

[Filed Jan. 28, 1993]

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By the Court:

The petition for writ of mandate is denied.
Dated: January 28, 1993

BLEASE,
Acting P.J.

**APPENDIX F**

Third Appellate District No. C015086
S031138

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

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JOHN J. HART,
*Petitioner*

v.

SACRAMENTO COUNTY SUPERIOR COURT,
*Respondent*

STOCKMAR ENERGIE INCORPORATED,
*Real Party In Interest*

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[Filed Mar. 17, 1993]

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Petition for review DENIED.

/s/ Mosk
Acting Chief Justice

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

No. 93-81

In The

# Supreme Court of the United States

October Term, 1993

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

JOHN J. HART,
*Petitioner,*

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a/ L.F.C. Power Corporation,
*Respondent.*

**Petition For A Writ Of Certiorari**
**To The Superior Court Of The State Of California**
**In And For The County Of Sacramento**
**Appellate Department**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. May an employee's claim of violation of his rights under Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, be heard for the first time on petition for certiorari, when this claim was never pressed or passed on below?

2. May the State of California, through Labor Code § 229, require an employee whose terms and conditions of employment are established by a collective bargaining agreement, which contains an arbitration clause, to pursue his wage and penalty claims through collectively bargained arbitration before resorting to administrative or civil litigation?

3. Is the state's assessment of a monetary penalty against an employer for "willfully" breaching a collective bargaining agreement preempted by Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a); the Garmon Rule stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); and/or the Machinists' Doctrine as enunciated in *Machinists v. Wisconsin Employment Relations Commission*, 417 U.S. 132 (1976)?

## LIST OF PARTIES

Respondent agrees with Petitioner's statement except that Respondent's correct name is: Stockmar Energy Corporation (d/b/a LFC Power Systems Corporation).[1]

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[1] Respondent is a wholly owned subsidiary of LFC Energy Corporation. LFC Energy Corporation is a majority-owned subsidiary of LFC Financial Corp. LFC Financial Corp. is a wholly owned subsidiary of Cawsl Enterprises, Inc., which is a wholly owned subsidiary of Cawsl Corp.

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No. 93-81

In The

# Supreme Court of the United States

October Term, 1993

JOHN J. HART,

*Petitioner,*

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a/ L.F.C. Power Corporation,

*Respondent.*

**Petition For A Writ Of Certiorari**
**To The Superior Court Of The State Of California**
**In And For The County Of Sacramento**
**Appellate Department**

## BRIEF IN OPPOSITION

## OPINIONS BELOW

Respondent agrees with the statement set forth in the Petition.

## JURISDICTION

Respondent does not disagree that this case is generally subject to 28 U.S.C. § 1257. However, as discussed herein, Respondent contends that the question presented by Petitioner was not raised in the courts below, and

therefore cannot be raised for the first time by Petition for Certiorari.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutes cited by Petitioner, 8 Cal. Code Reg. § 13520 provides:

> **§ 13520. Definition of "Willful."**
>
> A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> (a) Good Faith Dispute. A "good faith dispute" that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute."

## SUPPLEMENTAL STATEMENT OF THE CASE

Respondent states the following additional facts and corrections to the Statement of the Case presented by Petitioner:

1. At all times during his employment with Respondent LFC, Petitioner was covered by a collective bargaining agreement containing an arbitration clause, which governed the terms and conditions of his employment. Petitioner's App. 1a-2a.

2. Upon his termination from employment, Petitioner, through his Union, filed a grievance wherein he requested one hour overtime pay (consisting of two one-half-hour periods), safety bonus compensation, reinstatement and backpay, and "penalty pay under Federal and State law." Declaration of Ed Stuart in Support of Motion for Summary Judgment (App. 1a-4a hereto).

3. The underlying overtime dispute arose out of Hart's claim that pursuant to the terms of the collective bargaining agreement, he was entitled to, and earned, overtime which was not reflected in his final paycheck. Petitioner's App. 5a. Hart did not inform his supervisors that he had worked any overtime during the week in question, Petitioner's App. 2a, and conflicting evidence was presented at trial on the issue of whether he was ever authorized to work the claimed overtime and whether his employer knew about it. Petitioner's App. 2a, 5a-7a. Therefore, at the time of Petitioner's termination, Respondent disputed that any additional wages for overtime were due under the terms of the collective bargaining agreement, and paid him for all hours worked, except for the disputed overtime. Petitioner's App. 2a.

4. The parties resolved Petitioner's entire claim through the grievance procedures established in the collective bargaining agreement. Thus, two weeks after his employment ended, Petitioner, through his union representative, presented a written grievance to Respondent claiming, *inter alia*, overtime wages and all applicable penalties under state and federal law. Petitioner's App. 2a. Two weeks later, the union representative and representatives of Respondent met to discuss the grievance. *Id.* Four days later, Respondent paid Petitioner Twenty Seven and $^{38}/_{100}$ Dollars ($27.38) for the claimed overtime, but declined to pay any penalties. *Id.* According to Business Agent Ed Stuart: "All of these issues were discussed, and it was concluded that the company owed Mr. Hart approximately $37 [sic $27] to fully and completely resolve all the issues that arose in the grievance." App. 1a.

5. Petitioner did not pursue his grievance any further, although the collective bargaining agreement provided for additional procedures, including arbitration. Petitioner's App. 2a and 3a. Moreover, other than filing an action in municipal court under the California Labor Code, he did not protest the handling of his grievance either by filing charges with the National Labor Relations Board (NLRB) under Section 8(a)(5) or Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. §§ 158(a)(5), 158(b)(1)(A), or by filing a federal court action under Section 301 of the NLRA, 29 U.S.C.

§ 185, alleging any improper conduct by either Respondent or his union.[2]

6. The trial court concluded that the federal and state penalties sought by Petitioner in his written grievance were not included or excluded by the collective bargaining agreement. Petitioner's App. 3a. Thus, the court did not reach the issue of whether or not Petitioner could have obtained penalties under California Labor Code § 203 through the grievance process. In fact, Section II.5 of the collective bargaining agreement provides:

> Nothing in this Agreement either by its statement or omission shall serve as a means to eliminate the protection or rights as guaranteed to the employees and to the UNION by the applicable Federal and State statutes, Codes and Regulations.
>
> Defendant's Trial Exhibit "A."

7. At no time during any of the proceedings below did Hart ever assert that his rights under Section 7 of the NLRA, 29 U.S.C. § 157, would be violated if he were denied state law relief based upon either California Labor Code § 229 or § 301 of the NLRA. Instead, the proceedings below addressed only the issue of whether his claim

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[2] The trial court found that Petitioner did file a charge with the NLRB to enforce the state penalties, over which the NLRB declined jurisdiction. Petitioner's App. 3a. In fact, the only NLRB charge filed by Hart consisted of a charge filed under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), alleging discriminatory failure to pay a safety bonus, which was dismissed by the NLRB. Complaint, paragraph 15 and Exhibit "C" thereto.

was barred under either state law or federal preemption grounds.[3]

## REASONS FOR DENYING THE WRIT

### I. PETITIONER FAILED TO RAISE BELOW THE ISSUE OF WHETHER APPLICATION OF FEDERAL PREEMPTION PRINCIPLES DENIED HIM RIGHTS GUARANTEED UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

As a prerequisite to Supreme Court jurisdiction under 28 U.S.C. § 1257, Petitioner has the burden of establishing that the issue upon which he seeks review was raised in the state court. *Clark v. Jeter,* 486 U.S. 456, 459-60 (1988). Thus, it is the practice of this Court not to decide federal claims that were not "pressed or passed upon" by the courts below. *Id.* at 459; *Banker's Life and Casualty Co. v. Crenshaw,* 486 U.S. 71, 79-80 (1988).[4] In order to establish that an issue has been properly raised below, " '[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance

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[3] The fact that Hart may have quoted from *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts,* 471 U.S. 724, 756 (1985) in his brief on appeal to the Superior Court, Petitioner's Brief at 6, does not amount to raising this issue, which was never ruled on by the Superior Court.

[4] In *Banker's Life,* this Court declined to decide whether this rule is jurisdictional, but concluded that prudence requires that review of such cases be denied. 486 U.S. at 79.

of the federal claim at the time and in the manner required by the state law.' " *Id.* at 77-78 (citing *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis in *Bankers Life* Decision). Accordingly, a federal claim or right which was never specifically made or asserted in state court cannot be said to have been denied by a state court judgment which does not refer to it. *Id.* at 78 and note 2 (citing *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)).

*Clark v. Jeter* is closely analogous to the present case. There, the plaintiff asserted on petition for certiorari to this Court that a state statute of limitations for maintaining an action to establish paternity was preempted by federal law. However, while arguing generally that the state statute applied by the state court was invalid, the plaintiff did not raise the federal preemption challenge in her arguments to the state court. Therefore, this Court refused to consider the preemption argument.[5] Similarly, Petitioner has framed the issue in this case as whether the Superior Court, Appellate Department, deprived Petitioner of rights guaranteed under Section 7 of the NLRA, 29 U.S.C. § 157. However, this claim was never raised by Petitioner below, and thus cannot be raised for the first time on a Petition for Certiorari before this Court.

The proceedings before the Superior Court involved the single issue, raised by Respondent, of whether Petitioner's claim for penalties under state law was barred under state law and preempted by § 301 and other aspects of the NLRA. At no time did Petitioner ever

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[5] The Court did, however, reverse the state court's ruling on equal protection grounds. 486 U.S. at 463.

assert that application of California Labor Code § 229 to this case would deprive him of federal rights under the NLRA.[6] Nothing in either the trial court or the appellate court decisions addresses this issue. Accordingly, the requirements for jurisdiction under 28 U.S.C. § 1257 have not been met and the Petition should be denied.

## II. THIS COURT SHOULD NOT INVOLVE ITSELF IN INTERPRETING AND APPLYING A VALID STATE LAW STANDARD WHICH DOES NOT REQUIRE RESOLUTION OF ANY FEDERAL QUESTION

Under California law, an employee who proves that he did not receive all wages due and owing to him upon termination is not automatically entitled to recover penalties under California Labor Code § 203. Instead, only a "willful" failure to pay wages is subject to penalties. Pursuant to 8 Cal. Code Reg. § 13520, no penalties may be assessed in the event of a "good faith" dispute that the wages are due. Thus, in determining whether to assess penalties, the court must evaluate the employer's subjective good faith in failing to pay the wages claimed.

Contrary to Petitioner's assertion, Labor Code § 229 does not necessarily bar all claims by employees covered by a collective bargaining agreement, but only those

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[6] Thus, this case is readily distinguishable from *Livadas v. Aubry*, 749 F. Supp. 1526 (N.D. Cal. 1990), *rev'd.*, 943 F. 2d 1140 (9th Cir. 1991), *amended*, 978 F.2d 552 (9th Cir. 1993), *Petition for Certiorari filed*, 61 U.S.L.W. 3836 (U.S. June 3, 1993) (No. 92-1920), in which this issue, framed as a claim under 42 U.S.C. § 1983, was expressly raised and ruled upon by both the District and Circuit Courts.

claims which require interpretation and application of the agreement and which are subject to arbitration. For example, in *Livadas v. Aubry*, it is possible that no interpretation or application of the collective bargaining agreement was required since the employer apparently did not dispute the employee's wage claim, 749 F. Supp. at 1528, 943 F.2d at 1141. In this case, however, Respondent disputed that Petitioner had worked the overtime he claimed, and paid the wages claimed only as a settlement of a grievance. Thus, under California Labor Code § 229 and 8 Cal. Code Reg. § 13520, the court would have had to analyze the collective bargaining agreement and evaluate Respondent's handling of the grievance in order to determine whether it acted in "good faith" in disputing the wage claim. The Superior Court correctly concluded that a penalty assessment under Section 203 was a derivative claim; it did not exist independently of the collective bargaining agreement, but was derived solely and exclusively from a determination that Respondent breached its collective bargaining agreement. Since this would have required interpretation or application of the collective bargaining agreement, the Superior Court correctly concluded that § 229 barred Petitioner's claim.

Labor Code Section 229 fosters the strong public policy of the State of California favoring arbitration. *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App.3d 35 (1972), *aff'd*, 414 U.S. 117 (1973). This policy follows the national labor policy promoting the resolution of labor disputes through the grievance-arbitration process. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). "A contrary rule which would permit an individual

employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." Id. at 653. Thus, Section 229 does nothing more than state that employees covered by a collective bargaining agreement containing an arbitration clause must first exhaust their administrative remedies before resorting to court action, a statement of law which has already found approval before this Court. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Petitioner claims that "the [Labor] Commissioner – as endorsed by the court – read § 229, the state legislature's pre-emption formula, to deprive any employee covered by a collective bargaining agreement of the protections of §§ 201 and 203." Petition at 10. This is an incorrect statement of the lower court decision. First, Petitioner's claim, which is the subject of this Petition, was his civil lawsuit filed in the Sacramento County Municipal Court. That case was not an appeal of a decision by the State Labor Commissioner and there was no ruling by the Labor Commissioner to which Petitioner objects. Second, the Municipal Court did not rule that the grievance-arbitration panel was precluded from addressing § 201 and § 203 issues. It said that Petitioner requested all applicable penalties under state and federal law in his grievance, but that "[federal and state penalties] in fact are not included or excluded by the CBA."[7] Petitioner's App. 3a.

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[7] This Court has recently confirmed that an employee may be compelled to arbitrate statutory claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

On its face, Labor Code § 229 cannot be read in the manner which Petitioner suggests. Nowhere does it state that wage payment issues under § 201 or "waiting time" penalties under § 203 cannot be handled in the grievance-arbitration setting. Petitioner's grievance included such claims, and there is no indication that the grievance panel did not consider these issues in resolving the entire grievance by awarding Petitioner overtime pay and denying his claims for a safety bonus, reinstatement and back pay, and federal and state penalties.

The holding of *Plumbing, Heating, and Piping Employers Council of Northern California v. Howard,* 53 Cal.App.3d 828 (1975) is not to the contrary. While dealing with a wage claim and not statutory penalties, the court held that the purpose and intent of § 229 was to promote the use of collectively bargained arbitration as a means to resolve wage disputes emanating out of a collective bargaining agreement. Section 229 establishes a fair procedure by which all employees can pursue their claims. No employee, whether or not covered by a collective bargaining agreement, is denied a forum to present his claim. Moreover § 229 does not deny employees any substantive right to claim wages or penalties, whether based on contract or statute. Petitioner would make the instant case one in which a grievance panel specifically ruled that it had no jurisdiction over a statutory penalty claim, leaving the employee no forum to adjudicate the claim. Someday that case may arise, but this is not it.

The decision of the Superior Court reflects an application of a valid state law to the facts of this case. The

standard set forth in California Labor Code § 229 exempting wage claims which require application or interpretation of a collective bargaining agreement containing an arbitration clause is valid and does not impinge upon Petitioner's federally protected rights. As in *Livadas*, however, Petitioner merely contends that the Superior Court's application of that standard to the facts of this case was erroneous. Petitioner asks this Court to second-guess the factual determinations made by the state court and conclude that, as a matter of law, the State Court erred in applying its own standards to the facts of this case. Such intervention into the province of state law was rejected by the Ninth Circuit in *Livadas*, 943 F.2d at 1145-1147, and should be rejected here.

## III. THE STATE COURT DECISION IS CONSISTENT WITH ESTABLISHED FEDERAL LABOR LAW PREEMPTION DOCTRINE

### A. The Decision Comports with Established Principles of Preemption under NLRA § 301, 29 U.S.C. § 185

Contrary to Petitioner's assertion, the decision of the Superior Court in this case reflects no "lingering confusion" in identifying when state claims are "intertwined with" or "independent of" labor agreements. Petition at 8, citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). Instead, this is precisely the type of claim found subject to § 301 preemption under *Allis-Chalmers* and its progeny. In *Allis-Chalmers*, this Court held that an employee's state law tort action for bad-faith delay in

making disability payments due under a collective bargaining agreement was preempted under § 301, since the employer's duty to make timely payments in good faith could not be determined without consideration of its obligation to act in good faith in performing the contract. 471 U.S. at 215-19. The Court held that "only that result preserves the central role of arbitration in our 'system of industrial self-government.' " *Id.*, at 219 (citing *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)), and went on to list claims involving overtime pay among the "whole range of disputes traditionally resolved through arbitration," which must be preempted in order to avoid the possibility of restating such traditional contract claims as claims for breach of a good faith obligation under the contract. *Id.* Thus, this case, involving a claim for overtime wages and penalties under a collective bargaining agreement, falls squarely within the scope of § 301 preemption articulated by this Court.

Moreover, unlike *Livadas v. Aubry*, this case does not involve the issue of whether penalties under California Labor Code § 203 may be denied to an employee solely because he or she was covered by a collective bargaining agreement containing a grievance and arbitration clause. Instead, this case raises the issue of whether the state's standard of "willfulness," which requires an analysis of the employer's subjective good faith, may be applied to a disputed wage claim which was resolved by the grievance process contained in a collective bargaining agreement. Such state laws, which depend upon an evaluation of subjective criteria that implicate contractual obligations of good faith, generally cannot escape preemption. For example, Allis-Chalmers required an analysis of the

employer's "bad faith" in handling a disability claim under the contract. Similarly, the Ninth Circuit has determined that, while an employee's state law claim of handicap discrimination was not preempted, the same employee's claim for intentional infliction of emotional distress *was* preempted, since application of the state law standard for intentional infliction of emotional distress required the Court to consider the "reasonableness" of the employer's behavior which, the Court concluded, could depend on whether that behavior violated the collective bargaining agreement. *Miller v. AT&T Network Systems*, 850 F. 2d 543 (9th Cir. 1988).[8]

The Seventh Circuit has also concluded that state law claims alleging "willful" failure to pay wages when due are preempted under § 301. *National Metalcrafters v. McNeil*, 784 F. 2d 817 (7th Cir. 1986). Rejecting the notion that the state statute was a "minimum labor standard" subject to an exemption from preemption carved out in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court concluded that the determination of whether the failure to pay vacation pay allegedly due under the collective bargaining agreement was "willful" required an interpretation of the parties' "good faith" conduct under the agreement, and was thus preempted.

This case does not involve a "minimum labor standard" of the type found exempt from preemption under

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[8] In contrast, this Court found no preemption of an employee's retaliatory discharge claim, where the claim could be resolved without reference to obligations under the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

the *Machinists* doctrine in *Metropolitan Life* and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Both of those cases involved specific, non-discretionary benefits (mental health benefits and severance pay, respectively) guaranteed to all employees by state law, not a discretionary penalty imposed only on those employers whom the finder of fact determines have failed to act in "good faith" in satisfying their contractual wage obligations. The "good faith" standard of "willfulness" imposed by 8 Cal. Code Reg. § 13520 sets it apart form those state laws which impose "minimum labor standards" applicable to all employees, by requiring the Court (or Labor Commissioner) to undertake an evaluation of the employer's subjective good faith. Because the "good faith" of an employer signatory to a collective bargaining agreement is the subject of federal legislation, the California statute at issue in this case cannot be applied without reference to and interpretation of the collective bargaining agreement.

### B. The Decision is Consistent with the Prohibition Against State Interference with the Collective Bargaining Process Under *Garmon and Machinists*

While framed in terms of state law and preemption under NLRA § 301, 29 U.S.C. § 185, the Superior Court's decision is also constant with the principles of NLRA preemption set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). Under *Garmon*, a state may not regulate conduct which is arguably protected by § 7 of the NLRA, 29 U.S.C. § 157,

or arguably prohibited by § 8, 29 U.S.C. § 158, 359 U.S. at 244-45. Under *Machinists*, a state may not regulate the collective bargaining process, which is a matter Congress intended to leave unregulated. 427 U.S. at 152-53.

This case falls well within the scope of both aspects of NLRA preemption doctrine. Section 8(a)(5), 29 U.S.C. § 158(a)(5), of the NLRA prohibits an employer from refusing to bargain collectively with a union that is the representative of its employees. That duty includes an obligation to confer in good faith with respect to wages, hours and other terms and conditions of employment. NLRA § 8(d), 29 U.S.C. § 158(d). The duty to bargain in good faith extends throughout the life of a collective bargaining agreement, *Conley v. Gibson*, 355 U.S. 41, 46 (1957), and includes the duty to process employee grievances over wages and other terms and conditions of employment in a prompt and timely manner. *See, e.g., American Beef Packers, Inc.*, 193 NLRB 1117, 1119-20 (1971); *NLRB v. Southwestern Electric Cooperative, Inc.*, 794 F.2d 276 (7th Cir. 1986). This rule "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited by or arguably prohibited by the Act. . . . The rule is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration' . . . " *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282, 286 (1986). Thus, the rule prohibits a state from granting a remedy which has been withheld from the NLRB. *Id.* at 287.

Imposition of penalties under California Labor Code § 203 where, as here, the parties resolved the employee's claim for wages and penalties through the contractual grievance procedures, would be tantamount to finding that Respondent failed to act in good faith in its handling of the grievance and imposing a remedy not available to the NLRB. Such a determination would interfere with the "integrated scheme of regulation" adopted by Congress, *Garmon*, 359 U.S. at 247, and is therefore preempted.

Likewise, the imposition of state law penalties would be an impermissible intrusion into the collective bargaining process, which Congress intended to leave unregulated. *Machinists*, 427 U.S. at 147. Respondent's "good faith" under 8 Cal. Code Reg. § 13520 cannot be evaluated without examining the collective bargaining and grievance handling process itself. Under the facts of this case, any determination that no good faith dispute existed over Petitioner's wage claim would nullify the grievance resolution process agreed upon by the parties. Such a result would completely undermine the federal policy favoring arbitration of disputes arising under collective bargaining agreements. *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960). Indeed, were this Court to grant the relief requested by Petitioner, employers would be discouraged from entering into collective bargaining agreements containing grievance and arbitration procedures, since they would be unable to rely on those procedures to resolve any wage disputes that may arise. Rather than foster the national policy favoring arbitration of employment disputes, this result would instead force employees to litigate every wage dispute – including those as minor as the $27.38 involved here – in state

court, thereby undermining the federal policy favoring quick and economical resolution of employment disputes.

Contrary to Petitioner's assertion, the decisions of the Fourth, Eighth and Ninth Circuits do not create any conflict requiring resolution by this Court. In *Rum Creek Coal Sales v. Caperton*, 971 F. 2d 1148 (4th Cir. 1992), the Fourth Circuit held that the state's denial of basic police protection to an employer's property during a violent labor dispute violated the employer's right to withstand a strike by providing unjustified support to the strikers, thus undermining the policy favoring free interplay of economic forces set forth in *Machinists* and *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1990); 971 F.2d at 1153-54. Conversely, in *Steelworkers v. Johnson*, 830 F. 2d 924 (8th Cir. 1987), the Eighth Circuit held that the denial of unemployment benefits to striking employees on the basis of union membership violated the employees' rights guaranteed by § 7 of the NLRA, 29 U.S.C. § 157; 830 F.2d at 929.

Neither *Livadas* nor this case conflicts with these decisions. In *Livadas*, the Ninth Circuit held that the California Labor Commissioner's policy of declining jurisdiction over wage claims that concern the application and interpretation of a collective bargaining agreement, as required by state law, was valid and concluded that an employee does not have a federally protected right to a correct application of that state standard to a given set of facts. 943 F. 2d at 1146. Moreover, even if the issue in *Livadas* were framed, as suggested by Judge Kozinski's dissent, as whether the Labor Commissioner's policy deprived the employee of her rights under § 7 of the

NLRA, 29 U.S.C. § 157, it does not conflict with the decisions of the Fourth and Eighth Circuits relied upon by Petitioner herein. Neither *Rum Creek* nor *Steelworkers v. Johnson* involved the analysis of the parties' conduct under the terms of a collective bargaining agreement, but instead dealt only with the denial of benefits based upon a party's involvement in a labor dispute. Thus, the decisions are readily distinguishable on their facts and issues presented.

Granting Petitioner's demand that this Court supplant the grievance and arbitration process with its own evaluation of the employer's handling of Petitioner's wage claim would irreparably destroy the primacy of resolution of labor disputes through arbitration upon which federal labor policy rests. Rather than fostering cooperation between management and labor, allowing employees such as Petitioner to sidestep the available grievance processes and sue their employers in court would turn every wage dispute under a collective bargaining agreement into a state court lawsuit, depriving the parties of the right to negotiate their own means of dispute resolution. Such a result is plainly contrary to the purposes of the NLRA, and should not be considered by this Court.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: OCTOBER 18, 1993

Respectfully submitted,

COOK, BROWN, REDIGER & PRAGER
DENNIS B. COOK*
DOROTHY BACSKAI EGEL
*Counsel of Record
*Attorneys for Respondent*

## APPENDIX

### DECLARATION OF ED STUART

I, Ed Stuart, hereby declare and state:

1. I am the business agent for the National Independent Union (NIU) which is signed to a collective bargaining agreement with LFC Power Systems Corporation for the Greenleaf I project located in Yuba City, California. This collective bargaining agreement covers the work of all electricians on this jobsite.

2. John J. Hart was an electrician that worked under the terms and conditions of this agreement on this jobsite for LFC Power Systems Corporation. Mr. Hart sent a letter to me, a copy of which is attached hereto and incorporated herein, marked Exhibit 1, in which he stated that he was owed overtime wages and safety bonus monies, and that he was wrongfully discharged. Based upon this letter, I wrote up a grievance, which is also attached hereto and incorporated herein by reference, marked Exhibit 2. This grievance was discussed with LFC Power Systems Corporation and the National Electrical Contractors Association, Sacramento Valley Chapter (NECA), which is also signatory to the collective bargaining agreement. All of these issues were discussed, and it was concluded that the company owed Mr. Hart approximately $37 to fully and completely resolve all the issues that arose in the grievance.

3. I have read the foregoing declaration and declare under penalty of perjury that it is true and correct and if

called upon to testify, would testify the same. Dated this 13th day of December 1988 in Elk Grove, California.

/s/ Ed Stuart,
Ed Stuart, Business Agent, NIU

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EXHIBIT 1

[Handwritten Original]

PREPARED BY J. HART
DATE 9-10-88

WED. Aug. 24 – Company holds evaluations and in conference with Don ——— (supervisor) and Bill Butterfield (superintendent) Bill suggests that I come in half hour early to study the prints and get orgainized. [sic] I agreed it would make my job easier. Bill said he would pay me the overtime and for me to start coming in a half hour earlier.

THURS. I report to work at 6:30 work until 3:30 – 8½ hrs.

FRI. I report to work at 6:30 work until 3:30 – 8½ hrs. Dutch Holland asks me if I would like to have a conference with 3 other workers to hash out our differences which had been causing grief on the jobsite. I told him I would like to have such a conference and asked to have Don ——— present as he apparently had told these other workers a different story than he told. Dutch Holland came back from the office later that afternoon and told me that the confrence [sic] had been denied.

MON. Aug. 29

I reported to work at 6:30 and was told to report to the trailer at 10:15. I was discharged by Don ———. I asked why I was being fired. Don could not come up with a reason. I requested my safety bonus of $100.00 that had been promised me. I also pointed out that my check was short and that they owed me for a half hour overtime on Thursday and Friday. [Aug 26, 27]. Don said he would get it straightened out and mail me a check. I have not received such check. So I am filing this greivence [sic]. I feel that I have been wrongfully discharged and that I am owed 127.37 in wages. I request that I be reinstated in my job and that I be given back-wages and all applicable penalties under state & federal law.

/s/ J. Hart

---

EXHIBIT 2

[Partially Handwritten Original]

Date 9-[illegible]-88

SENT TO: _____

BUSINESS REPRESENTATIVE: Edgar L. Stuart

GRIEVANCE

Employee's Name John Hart

Home Address 376 Lexington Ave, San Francisco CA 94110

Firm Name L.F.C. 5087 Township Rd. Yuba City Headquarters _____ Date Grievance occurred Aug. 29, 1988 Time 10:15 am Foreman or Supervisor Don Shop Steward _____ Has this been taken up with the shop steward? ____ When? _____ Nature of Grievance Wrongfully discharged settlement requested, John Hart be re-instated and be made whole for all wages including safety bonus – and penalty pay, under federal and state law. Signature of Employee _____ Date _____ Results of Discussion between Shop Steward and Supervisor: _____ Signature of Shop Steward _____ Date _____ Remarks _____

Use back of this sheet for additional information.

Supreme Court, U.S.
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No. 93-81

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

PRINTED COPY

JOHN J. HART,
*Petitioner,*

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a L.F.C. POWER CORPORATION,
*Respondent.*

**On Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Sacramento, Appellate Department**

## REPLY BRIEF FOR PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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No. 93-81

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JOHN J. HART,

*Petitioner,*

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a L.F.C. POWER CORPORATION,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Sacramento, Appellate Department**

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## REPLY BRIEF FOR PETITIONER

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Petitioner, John J. Hart, files this Reply Brief to address a number of misleading arguments made by Respondent, L.F.C. Power Corp., in its Brief in Opposition ("Br. Opp.").

A. LFC's claim that Hart failed to meet the prudential criteria for a grant of *certiorari* (Br.Opp. at 5-8) is incorrect, for unlike the situations it cites, there is "no doubt from the record in this case that a claim under a federal statute . . . was presented in the state courts and that those courts were apprised of the nature or substance of [that] claim . . . ." *Webb v. Webb,* 451 U.S. 493, 501 (1981). In both *Banker's Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988), and *Clark v. Jeter,* 486 U.S. 456 (1988), upon which LFC relies, the federal issues

urged on this Court had never been articulated to the state courts. By contrast, the record herein shows that Hart did press his claim in the courts below.

In *Banker's Life*, a challenge to a Mississippi law which imposed a 15% penalty on litigants making unsuccessful appeals, the petitioner had argued to the state supreme court that the penalty "was clearly excessive, not reasonably related to legitimate purposes, constitutes [an] excessive fine and violates constitutional principles." 486 U.S. at 77. On *certiorari* to this Court, petitioner then sought to argue that the penalty violated the U.S. Constitution's Eighth Amendment prohibition on excessive fines. This Court found the language presented to the state court "too oblique" to allow the conclusion that the Eighth Amendment claim had been presented below, as it made "no reference whatsoever to the Eighth Amendment, the Federal Constitution or federal law." *Id.* at 77-78. Moreover, even had the state court understood the case to involve the constitutionality of the fines, it would not have known whether the claim arose under the U.S. Constitution, or under a similar provision in the state constitution. *Id.* at 78.

This Court likewise refused to entertain a federal statutory question that had not been pressed in the state courts in *Clark v. Jeter*, 486 U.S. 456. The appellant in *Clark* challenged the Pennsylvania six-year statute of limitations for paternity actions. In both the state court and in this Court, Clark had fashioned an argument based on a seeming inconsistency between the state statute and the federal Child Support Enforcement Amendments of 1984. This Court found, however, that while Clark sought to argue here that the state statute of limitations was preempted by the federal amendments—a question of federal law—the issue she had pressed below, whether the legislature had intended the statute to be read in a manner consistent with federal law, was purely a question of state law. 486 U.S. at 459-60.

In contrast to both *Banker's Life* and *Clark*, Hart made plain to the state courts that this case involves the federal issue of the impact that the misapplication of preemption principles under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, has on the rights guaranteed him by § 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. In appealing the Municipal Court's assessment of penalties under § 203 of the California Labor Code, LFC argued, *inter alia*, that both § 229 of the Code and principles of federal preemption under § 301 of the LMRA precluded Hart from recovering. Hart opposed that appeal, denying that § 301 precluded the state from granting him the protections of its minimum labor standards. Citing *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), Hart pointed out that this Court has previously held that federal law does not preempt the application of state minimum labor standards to employees covered by collective bargaining agreements. And Hart went on to stress, as this Court had in *Metropolitan Life*, that holding otherwise, and *denying* organized employees the protections afforded to those not covered by collective bargaining agreements, "would turn the policy that animated the Wagner Act on its head." Respondent's Opening Brief on Appeal from the Municipal Court of Sacramento County, at 7 (*quoting Metropolitan Life*, 471 U.S. at 756).

In making that argument, Petitioner admittedly did not cite specifically to Section 7 of the NLRA. However, he clearly made the point that if the Superior Court were to reverse the Municipal Court and deny him his state-guaranteed rights on the grounds urged by LFC, that denial would implicate his rights under the Wagner Act. Moreover, Petitioner made this reference to federal law explicit in his Petition for Writ of Mandate to the California State Supreme Court, in which, in seeking review of the Superior Court decision, he argued that denying the

minimum benefits of the California wage law to organized employees is tantamount to placing a direct sanction on union membership, in contravention of the protection afforded by NLRA § 7. Petition for Writ of Mandate at 20-23.

If anything, the issue articulated in the petition for writ of *certiorari* constitutes a "mere enlargement" of the federal issue Hart presented first to the Superior Court and then, in more explicit terms, to the State Supreme Court. *Banker's Life*, 486 U.S. at 78 n.2, *citing Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). Hart clearly pressed upon the state courts his contention that it would violate his rights under the federal labor laws to deny him the benefits he sought in this case. Particularly since, in making all of these arguments in the state courts, Hart was pursuing his case pro se, *cf. Pollard v. U.S.*, 352 U.S. 354, 359 (1957), Petitioner should be deemed to have met this Court's prudential standards for having "pressed" his federal claim in the courts below. *Banker's Life*, 486 U.S. at 79-80.

B. In reformulating the questions presented, LFC has displayed a fundamental misapprehension of what this case is about. Contrary to the impression the Company seeks to create, this case is *not* about whether a state may assess penalties "against an employer for 'willfully' *breaching a collective bargaining agreement* . . . ." Br.Opp. at i (emphasis added). Nor does this case raise the issue whether an employee covered by a collective bargaining agreement "which contains an arbitration clause, [may be required] to pursue his wage and penalty claims through collectively bargained arbitration *before resorting* to . . . litigation." *Id.* (emphasis added). Rather, this case presents the question whether the state may *deny* benefits to an employee whose employer willfully violated a *statutory requirement*, without even considering whether similar benefits are available under the collective bargaining agreement. And, rather than being about exhaustion of contractual remedies, this case is about whether the state

may use the mere fact that an employee is working under a collective bargaining agreement with an arbitration clause as an *absolute bar* to that employee's right to pursue a statutory claim—again, regardless of whether the employee is entitled to pursue that claim through the bargaining agreement.

1. LFC contends that any finding that Hart is entitled to penalties under the California Labor Code would be "derived solely and exclusively from a determination that Respondent breached its collective bargaining agreement," and thus, that the claim is validly barred by Section 229 of the California Labor Code, as interpreted by the Superior Court. Br.Opp. at 8-9. This is a total misreading of the statute, and of the proceedings below.

The California Labor Code guarantees employees that if they are discharged, "the wages earned and unpaid at the time of discharge are due and payable immediately." Cal. Lab. Code § 201. The Code does not define the terms and conditions under which wages are earned or employees may be discharged; it simply establishes, as a minimum protection, that employees will receive their wages immediately upon being discharged. As an enforcement measure, the Code imposes penalties on employers who "willfully fail[] to pay . . . ." *Id.* at 203. And the Code defines the factual basis for imposing such a penalty: An employer's failure to pay wages will be deemed "willful" when the "employer intentionally fails to pay wages to an employee when those wages are due." 8 Cal. Code Reg. § 13520. A finding that there was a "good faith dispute that any wages are due" will preclude a finding of willfulness; but "[d]efenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute.'" *Id.*

The issues that the Municipal Court had to resolve in determining Hart's entitlement to penalties under the Labor Code were therefore (1) whether LFC failed to pay him the full wages he had earned and was owed at

the time he was discharged; (2) whether its failure to do so was "willful"; and (3) whether there was evidence of a "good faith dispute" that would preclude a finding of willfulness. As this Court wrote in *Lingle v. Norge Division, Magic Chef*, 486 U.S. 399, 407 (1988), "[e]ach of these purely factual questions pertains to . . . the conduct and motivation of the employer. [None] of the elements requires a court to interpret any term of a collective bargaining agreement."[1] In awarding Hart penalties, the Municipal Court examined the facts—*not the collective bargaining agreement*—and found that Hart "was authorized to work the overtime hours, that he did work the overtime hours, and that he was not paid for the overtime hours until more than thirty (30) days after they were due." Petition for Writ of Certiorari, Appendix ("Pet.App.") at 8a. The court further found—again, without recourse to the collective bargaining agreement—that "[t]he circumstances of this case, on the evidence presented, preclude a finding of a good faith dispute; [and that] Defendant's failure to pay the overtime was 'willful' within the meaning of Labor Code § 203." *Id.*[2]

2. LFC's arguments regarding Hart's purported obligation to exhaust the contractual grievance arbitration procedure are simply wrong. In the first place, Petitioner *did* file a grievance, and pursued it as far as the union was willing to take it. Pet.App. at 3a. Under the parties'

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[1] Under California law, a finding of willfulness requires only proof that the employer "intentionally fail[ed] or refuse[d] to perform an act which is required to be done"; not that the employer was motivated by "a deliberate purpose to defraud" the employee. *Triad Data Services, Inc. v. Jackson*, 153 Cal.App.3d Supp. 1, 9, 200 Cal. Rptr. 418 (1984).

[2] The only reason for which the court would have even arguably had to consult the collective bargaining agreement was to determine Petitioner's rate of pay. However, under the teachings of *Lingle*, the fact that federal law would govern any such questions of contract interpretation does not preempt the separate state law questions. 486 U.S. at 413 n.1. And in any event, there was no dispute in this case as to the applicable wage rate.

collective bargaining agreement, "[a]ll grievances . . . shall be adjusted by the duly authorized representatives of each of the parties to this Agreement." Section 1.4(c), Defendant's Trial Exhibit "A". In the absence of a contractual provision permitting him to pursue his grievance on his own, Hart had, in fact, exhausted his contractual remedies.

Hart has never complained in this action that § 229 precluded him from pursuing his penalty claim through the grievance arbitration procedure; and LFC's contentions in this regard (Br. Opp. at 10-12) totally misconstrue the underlying nature of this action. Petitioner is *not* here asserting that he was wrongfully denied the right to pursue this claim in *arbitration*. Rather, he is asserting that the Superior Court misapplied § 229 and principles of federal preemption in finding that the mere existence of an arbitration procedure precluded him from pursuing this claim *in court*.

The fact is that Hart *is* precluded from obtaining this statutory remedy through the contractually-provided grievance procedure. That result, however, is a function of the operation of federal labor policy, not the State Labor Code. As the Municipal Court found, neither the company nor the union—the two parties to the collective bargaining agreement—viewed the agreement as providing waiting time penalties; the agreement simply did not address the issue. Pet.App. at 3a (penalties "in fact are not included or excluded by the CBA.") As this Court has long held, an "arbitrator is confined to interpretation and application of the collective bargaining agreement, . . . [and] his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Thus, even had the union decided to pursue the grievance through the arbitration procedure, the arbitrator would have been without authority to grant

Hart the penalties which, though provided under state law, had no basis in the bargaining agreement.[3]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] The Company's citation to *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991) (Br. Opp. at 5) is totally inapposite to this case. In *Gilmer*, this Court held that an employee's express commitment, in his individual employment contract, to arbitrate all disputes arising out of his employment is enforceable under the Federal Arbitration Act. That ruling says nothing about whether a general statement, in a collective bargaining agreement, that "[n]othing in this Agreement . . . shall serve as a means to eliminate the protection or rights guaranteed to the employees . . . by the applicable . . . State statutes, Codes and Regulations" (Br. Opp. at 5), serves as a waiver of an individual employee's right to pursue his state rights through statutorily-provided means.